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No. 17-467

In the Supreme Court of the United States

ANDREW KISELA,

Petitioner,

v.

AMY HUGHES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. The Undisputed Facts on Which the District Court Relied Are Sufficient for Summary Judgment 2

II. Summary Reversal Is Appropriate Because Precedent Had Not Clearly Prohibited Kisela's Actions 7

III. The Opinion Diverges from Four Circuits' Precedent on Potential Harm to Third Parties 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Anderson v. Creighton,
483 U.S. 635 (1987) 10

Ashcroft v. al-Kidd,
563 U.S. 731 (2011). 1, 2, 7, 8, 10

Blanford v. Sacramento County,
406 F.3d 1110 (9th Cir. 2005) 8, 9, 10

Brosseau v. Haugen,
543 U.S. 194 (2004) 7, 8

City of S.F. v. Sheehan,
135 S. Ct. 1765 (2015) 10

Larsen's Estate v. Murr,
511 F.3d 1255 (10th Cir. 2008) 11, 12

Long v. Slaton,
508 F.3d 576 (11th Cir. 2007) 12

Mullenix v. Luna,
136 S. Ct. 305 (2015) 10

Reichle v. Howards,
132 S. Ct. 2088 (2012) 8

Scott v. Harris,
550 U.S. 372 (2007) 2, 4, 7

Tennessee v. Garner,
471 U.S. 1 (1985) 2, 3, 4, 6

White v. Pauly,
137 S. Ct. 548 (2017) 1, 4, 8, 10, 12

Wilson v. Layne,
526 U.S. 603 (1999) 8

OTHER AUTHORITY

Bryan A. Garner, *Garner's Modern American Usage*
(2009) 5

REPLY BRIEF FOR PETITIONER

The primary error below, which prompted Judge Ikuta and six of her colleagues to dissent from the denial of rehearing en banc, is the level of generality at which courts declare "established law" for purposes of qualified immunity. *See* App. 17. The Ninth Circuit panel found "established law" controlling this case only by framing both the contested conduct and existing precedent at an exceedingly high level of generality. Pet. 21-30. After all, only by extreme abstraction can the Ninth Circuit maintain its rule that "qualified immunity may be denied in novel circumstances." App. 45; *see also* Pet. 27 n.2 (discussing impossibility of this rule after *White v. Pauly*, 137 S. Ct. 548 (2017)). Summary reversal is appropriate on this point. Secondarily, the Ninth Circuit exacerbated a circuit split on the relevance of potential third-party harm in excessive-force cases.

Hughes's Brief in Opposition ignores the former point and attempts to obscure the latter by asserting that the Petition and Judge Ikuta's dissent misstate the relevant facts. In doing so, Hughes adopts contradictory arguments. On the one hand, the Ninth Circuit panel stripped Officer Kisela of qualified immunity by unjustified abstraction. On the other hand, Hughes now attempts to evade this Court's review by arguing that this case is fact-intensive. Not only are these positions an uncomfortable pair, but Hughes misunderstands the direction in which fact-intensity cuts: the burden is on the party seeking to *defeat* qualified immunity to identify precedent with facts sufficiently on point to "place[ ] the statutory or constitutional question beyond debate." *Ashcroft v. al-*

Kidd, 563 U.S. 731, 741 (2011). Because that feat is possible only with impermissible abstraction, this Court should grant the Petition and reverse the decision below.

I. The Undisputed Facts on Which the District Court Relied Are Sufficient for Summary Judgment.

This case turns on legal errors. Nevertheless, Hughes poses nine questions supposedly illustrating hopelessly disputed facts. Her dispute, however, concerns the legal conclusions to be drawn from facts rather than a dispute over the facts themselves.

Use of deadly force is appropriate "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). "[T]he reasonableness of [an officer]'s actions . . . is a pure question of law." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007). With that standard in mind, and viewing the evidence in the light most favorable to Hughes, the following statements answer her questions.

1. Did Hughes appear agitated, or was she calm and peaceable? Br. in Opp. 8.

During the confrontation, she appeared "composed and content." ER 109.

But that does not equate to her being "harmless" or "peaceable." *Cf.* Br. in Opp. 8. Tragically, people who harm others are sometimes perfectly composed when doing so.

The district court rightly granted summary judgment on the basis of the following uncontroverted evidence. Shortly before the encounter, a woman matching Hughes's description was seen hacking at a tree with a large kitchen knife. ER 280-81. Hughes held a large kitchen knife as she walked down the driveway and approached Chadwick. ER 281, 284-85, 313, 322. She followed Chadwick when the latter tried to back away. ER 200, 207-09, 281, 290. And Hughes disregarded at least two orders to drop the knife. ER 208, 281. This conduct occurred not in the kitchen but in the driveway, where carrying such a knife makes little sense. Hughes was not "harmless" in this context.

To suggest a material dispute on this point, Hughes cites only her denial of a Request for Admission, in which Kisela asked her to "[a]dmit that you were not acting peaceably when the police confronted you on May 21, 2010." ER 194-95. In the same document, Hughes also denies that the kitchen knife "was a deadly weapon" or was "capable of causing serious bodily harm to Sharon Chadwick." ER 195. These made-for-litigation denials do not a controversy make.

2. Did Hughes threaten Chadwick? Br. in Opp. 9.

The officers did not hear Hughes make any overt threats against Chadwick, ER 325, or see any "threatening or aggressive gestures," ER 305-06.

But the question is whether Kisela had probable cause to believe that Hughes posed a threat to Chadwick. *Garner*, 471 U.S. at 3. The facts reprised above present a situation—caused by Hughes's actions—that establish precisely that probable cause.

Importantly, however, this is a legal conclusion rather than a factual dispute. *Scott*, 550 U.S. at 381 n.8.

3. How many times did the police instruct Hughes to drop the kitchen knife? Br. in Opp. 10.

Chadwick heard "one of the officers yell 'drop the knife' two times, very quickly." ER 109. The district court relied on this undisputed number. App. 72.

4. Did the officers reasonably believe that Hughes heard their instructions to drop the kitchen knife? Br. in Opp. 10; *see id.* at 15, 16.

This question is immaterial. Hughes cites no authority holding, or even intimating, that an officer may not use deadly force if the suspect does not actually hear and understand the orders. Indeed, even the requirement that an officer provide a warning is not absolute. *Garner*, 471 U.S. at 11-12 (officers should provide warning "where feasible"); *White*, 137 S. Ct. at 551 (reversing denial of qualified immunity that rested on failure to say anything before shooting). Here, it is undisputed that the officers shook the fence to get Hughes's attention and ordered her at least twice (in a scenario that unfolded in less than a minute) to drop the knife. ER 109.

5. What did Chadwick say to the officers who were pointing their guns at Hughes? Br. in Opp. 11; *see id.* at 15.

"Take it easy," which she said to both the officers and Hughes. ER 199.

6. When Kisela shot Hughes, how far apart were Hughes and Chadwick? Br. in Opp. 11.

–and–

7. When Kisela shot Hughes, was Hughes approaching Chadwick or standing still? Br. in Opp. 12; *see id.* at 15.

Hughes had moved to within five-to-six feet away from Chadwick, ER 281, and stood there, ER 306.

There was no need to move any closer: she was already in the "kill zone," ER 281, 290, where she could have attacked Chadwick in less than half a second, ER 235, giving Kisela extremely little time to make a decision and take action to protect Chadwick. In short, Hughes did not need to get any closer to pose a threat.[1]

8. Did Hughes "wield" the kitchen knife at any point? Br. in Opp. 12; *see id.* at 15.

Hughes challenges the Petition's and Judge Ikuta's use of the word "wield" to describe her being armed with a large kitchen knife as she stood within six feet of an unarmed woman. Br. in Opp. 12-13. She relies on Judge Berzon's footnote stating that "wield" has been defined as, for example, "[t]o use or handle with skill and effect." App. 15 n.3. This is just caviling. The word does not necessarily connote skillful use. It also means "handle" or "use." Bryan A. Garner, *Garner's Modern American Usage*, 864 (2009). But to placate Hughes, one could replace all instances of

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[1] Hughes states that during the confrontation, she moved away from Chadwick. Br. in Opp. 12. But when Kisela fired, she had approached and was standing close to Chadwick. ER 306.

"wield" with a different term—the district court used "carrying" and "holding," App. 72—without changing the analysis or result.

9. When Kisela shot Hughes, where was the knife? Br. in Opp. 13.

It was in Hughes's hand, held down at her side. ER 109.

Apart from these nine "questions," Hughes argues, incorrectly, that the Petition and Judge Ikuta's dissent omit material facts.

She first notes that only Kisela fired his gun. Br. in Opp. at 13-14. Though true, this fact is insignificant. The question is whether there was probable cause for Kisela to use force. *Garner*, 471 U.S. at 3. Hughes cites no authority establishing that an officer's use of potentially deadly force is legitimate only if *all* officers on the scene take the same action. Many factors can play into an officer's split-second decisions in dangerous situations like this one. For example, an officer might not have a clear line of fire to the suspect, which was true of Officer Kunz. ER 325.

Hughes next argues that it is unfair to describe her as having acted erratically. Br. in Opp. 15-16. She appears to concede that walking down the street and hacking at a tree with a large kitchen knife—the conduct that brought the officers to the scene—was erratic. *Id.* She asserts, however, that she was calm when the officers arrived. *Id.* at 16. There are at least two problems with this argument. First, little time had elapsed between the report of her tree-hacking and the officers' arrival; certainly a reasonable officer should bear in mind the subject's recent behavior when faced

with a potential life-or-death situation. Second, following an unarmed person down a driveway with a kitchen knife is itself erratic behavior.

Hughes strategically plays up the fact-intensiveness of this (like every) qualified-immunity case in an attempt to dissuade the Court from exercising review. But nothing in the Petition, Judge Ikuta's dissent, or the district court's opinion relies on disputed facts. The question on which the Ninth Circuit panel erred was whether a reasonable person in Officer Kisela's position could have perceived that Hughes posed a threat to Chadwick (and, if not, whether the unconstitutionality of the force used was clearly established, *see infra* Part II). The panel thus incorrectly decided a legal question. *See Scott*, 550 U.S. at 381 n.8. The relevant facts are known, and this Court should not decline to review the Ninth Circuit's flawed legal conclusion regarding the reasonableness of Officer Kisela's use of force.

II. Summary Reversal Is Appropriate Because Precedent Had Not Clearly Prohibited Kisela's Actions.

Qualified immunity requires a two-part showing: "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Al-Kidd*, 563 U.S. at 735. The two-part approach is important because the existence of a constitutional violation in Fourth Amendment cases "depends very much on the facts of each case," due to the "hazy border between excessive and acceptable force." *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (internal quotation marks and citation omitted).

Against this backdrop, Hughes asserts that any constitutional violation Kisela committed was an obvious one. Br. in Opp. 19. To dispel the haze and adopt this position, the Ninth Circuit panel needed to find precedent with facts sufficiently close to those presented here such that "*every* reasonable official" would have known that Kisela's actions violated the Fourth Amendment. *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (emphasis added; quotation marks omitted). The panel purports to clear this hurdle by abstracting to a level of generality that allows comparison of otherwise distinguishable cases. To the contrary, the closest authority supports the legality of Kisela's actions.

Hughes bears the burden of "identify[ing] a case where an officer acting under similar circumstances as [Kisela] was held to have violated the Fourth Amendment." *White*, 137 S. Ct. at 552. Although she need not identify a case where "the very action in question has previously been held unlawful," *Wilson v. Layne*, 526 U.S. 603, 615 (1999), she must identify "existing precedent [that] placed the . . . constitutional question *beyond debate*." *Al-Kidd*, 563 U.S. at 741 (emphasis added); *accord Brosseau*, 543 U.S. at 201 (recognizing qualified immunity because previous cases did not "squarely govern[ ] the case"). Because this Court's case law provides no such clear condemnation, Hughes needed to identify a "'robust consensus of cases of persuasive authority.'" *Id.* at 742 (quoting *Wilson*, 526 U.S. at 617).

Hughes did not—indeed, cannot—carry this burden. Above all, *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005), prevents a finding of clearly

established law. As Judge Ikuta demonstrated, *Blanford*'s reasoning applies here. Similar to the subject in that case, Hughes:

- was armed;
- did not drop her weapon when ordered to do so;
- was not surrounded; and
- moved to within striking distance of Chadwick, "where she could have caused harm that the officers would not have been able to prevent."

App. 28. Thus, "Kisela could have reasonably relied on *Blanford* to justify his use of force against Hughes." *Id.* And this case is arguably even stronger than *Blanford*, where the potential victims were only hypothetical. 406 F.3d at 1113-17 (finding no constitutional violation where the officer shot a suspect in order to protect third parties who *might* have been—but actually were not—inside the home).

Hughes dismisses *Blanford* on the basis of immaterial factual distinctions. Br. in Opp. 16-17. This effort is misguided because Hughes and Kisela do not have an equal responsibility to find controlling precedent. Hughes alone must identify a case that would have put Kisela's actions beyond debate, and of all the cases cited in this litigation, *Blanford* is the most similar.

Rather than finding a case with similar facts that found a constitutional violation, Hughes, like the Ninth Circuit panel, collects cases that state their desired legal outcome on easily distinguishable facts. Br. in Opp. 19-26; *see also* Pet. 21-28 (explaining why the

panel's cited cases did not clearly establish a constitutional violation). Legal standards, however, are not enough when they are not particularized to the situation at hand, as this Court recently repeated. *White*, 137 S. Ct. at 552 (reiterating "the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality'") (quoting *Al-Kidd,* 563 U.S. at 742); *see Anderson v. Creighton,* 483 U.S. 635, 640 (1987). This requirement is especially important in Fourth Amendment cases. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

In fact, Hughes's task is impossible. *Blanford* is the most analogous case, and it holds that no constitutional violation occurred. 406 F.3d at 1116-19. That is the antithesis of a clearly established constitutional violation in the circumstances that confronted Kisela.

Finally, Hughes misrepresents the Petition's argument regarding disagreement among the Ninth Circuit judges. Kisela does not argue that qualified immunity is inappropriate based on the dissenting appellate judges' having found no constitutional violation. Br. in Opp. 28. Kisela's argument instead relies on the wide chasm between the judges over whether the law was clearly established. Seven appellate judges, reading the same cases as the panel, were unable to identify precedent clearly on point. If they could not do so with the benefit of briefing and time for consideration, then Kisela "had no fair and clear warning of what the Constitution requires." *City of S.F. v. Sheehan*, 135 S. Ct. 1765, 1778 (2015) (internal quotation marks and citation omitted).

Kisela was entitled to qualified immunity, and the panel manifestly erred by denying it. Summary reversal is appropriate.

III. The Opinion Diverges from Four Circuits' Precedent on Potential Harm to Third Parties.

The Petition asks the Court to clarify an important factor in excessive-force cases: How immediate a threat to others' safety must the suspect pose before it is reasonable for an officer to use potentially deadly force? Pet. at 12. The panel opinion forbids an officer from using such force unless the suspect is actively committing an assault on the third party, or at least indisputably on the verge of doing so. That is incompatible with the law in at least four circuits in which courts have found officers' use of deadly force reasonable—and therefore constitutional—even when no victim is immediately present or when the suspect has not commenced an attack.

Hughes responds to the division among the circuits with nothing more than summarizing the facts of those cases and declaring that they involved a greater threat than the present case. Br. in Opp. 31-32. That conclusory "distinction" does not obscure the division in the circuits' approach to third-party safety.

The Tenth Circuit, for example, has ruled that "[a] reasonable officer need not await the glint of steel before taking self-protective action; by then it is often . . . too late to take safety precautions." *Larsen's Estate v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) (internal quotation marks and citation omitted).

The Eleventh Circuit reached a similar conclusion in *Long v. Slaton*, 508 F.3d 576 (11th Cir. 2007). There, an officer shot an individual who had just stolen the officer's cruiser. *Id.* at 579. This occurred in a remote, rural area, and the suspect was driving away from the officer. Nonetheless, the court found it reasonable to protect potential (but not immediately present) victims. Echoing *Larsen's Estate*, it recognized that "an officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force." *Id.* at 581 (internal quotation marks and citation omitted).

Hughes responds by distinguishing certain facts. Br. in Opp. 31-34. This is essentially the same exercise in abstraction that dooms the panel decision below and warranted this Court's reversal in *White*. For example, the weapon in *Long* was a police cruiser, which, when used for unintended purposes, can cause "death or serious bodily injury." Br. in Opp. 32. That fact actually links the two cases: large kitchen knives can also cause death or serious bodily injury when not used for their intended purpose.

The Petition's point—which Hughes ignores—is that some circuits recognize that deadly force can reasonably be used even when the suspect is not yet indisputably engaging in an actual attack on a specific victim. The opinion below diverges from those cases, thereby creating a split on this vital issue. This Court should resolve that split in favor of protecting third parties.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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